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Supreme Court of the United States

OCTOBER TERM, 1954

No. 164

PHILIP ANDREW WITMER,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

REPLY BRIEF FOR PETITIONER

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Supreme Court of the United States

OCTOBER TERM, 1954

No. 164

PHILIP ANDREW WITMER,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

REPLY BRIEF FOR PETITIONER

MAY IT PLEASE THE COURT:

The reply of the petitioner will take up the different points of respondent's brief in the order in which they appear therein.

I.

The questions presented (page 2, respondent's brief) are unduly limited. The respondent entirely ignores the violation of procedural due process of law by the illegal rec-

ommendation of the Department of Justice to the appeal board. Regardless of whether there was basis in fact for the denial of the conscientious objector status this Court must determine whether the recommendation of the Department of Justice violated petitioner's rights, contrary to the statute and regulations.

II.

The second question (page 2, respondent's brief) is too narrow and restricted. The issue is not alone whether the board failed to give full consideration to the case. There is an additional problem involved also, which is *whether the local board refused to reopen and consider the case de novo* as required by the regulations.

III.

The emphasis placed by respondent upon the claim for agricultural classification (page 3, respondent's brief) is irrelevant to the issues. A registrant can claim different classifications at different times. It has been held that "successive deferments may be claimed on different grounds."—*Taffs* v. *United States,* 8th Cir., 1953, 208 F. 2d 329 (No. 576, October Term, 1953; cert. denied 347 U. S. 928 (1954)).

IV.

Emphasis is placed (page 4, respondent's brief) on the questions appearing in Selective Service Form No. 150 (special form for conscientious objector). The respondent has printed the instructions and the sections of the conscientious objector form that Witmer refused to sign. It quotes, also, his alternate statement. prepared in lieu of signing Series I(A) or I(B). The law did not require Witmer to sign the conscientious objector form in order to make his claim. (See Local Board Memorandum No. 41, appearing on page 38 of the main brief for petitioner.)

The statement (top of page 4, respondent's brief) signed by Witmer was sufficient to present the conscientious objector claim.

The special form for conscientious objector was amended, eliminating the parts of the form to which Witmer objected. In the new instructions the statement about the understanding of the registrant was eliminated. The new Series I, SSS Form No. 150 (revised April 22, 1952), reads as follows:

"Series I.—CLAIM FOR EXEMPTION

"INSTRUCTIONS.—The registrant must sign his name to either statement A or statement B in this series but not to both of them. The registrant should strike out the statement in this series which he does not sign.

(A) I am, by reason of my religious training and belief, conscientiously opposed to participation in war in any form. I, therefore, claim exemption from combatant training and service in the Armed Forces.

_____

(Signature of registrant)

(B) I am, by reason of my religious training and belief, conscientiously opposed to participation in war in any form and I am further conscientiously opposed to participation in noncombatant training and service in the Armed Forces. I, therefore, claim exemption from both combatant and noncombatant training and service in the Armed Forces.

_____

(Signature of registrant)"

The reason for this change was that difficulty was encountered with conscientious objectors because of the use of the word "understand" in the Series I in the old form. Many conscientious objectors, like Witmer, refused to sign such statement.—*United States* v. *Clark,* W. D. Pa., 1952, 105 F. Supp. 613.

V.

Respondent emphasizes (page 5, respondent's brief) the failure of petitioner to give "public expression" to his conscientious objector views. Failure to give public expression to one's private conscientious objections is no basis for a denial of the claim. The answer that Witmer made to this question (page 5, respondent's brief) does not at all dispute the sincerity of his claim. Elsewhere his papers showed that he preached publicly as one of Jehovah's Witnesses. What he meant when he answered this question was that conscientious objection is a personal matter with him upon which he did not make public talks from the platform. The question itself is a very ambiguous one. Therefore, the answer should not be taken here as the Government would like to have the Court take it. Registrants are not to be dealt with as though they were litigants represented by counsel. —*Berman* v. *Craig,* 3rd Cir., 1953, 207 U. S. 888, 891.

VI.

Respondent attempts to develop inconsistency on the part of petitioner (respondent's brief, page 6). On March 19, 1951, petitioner presented an affidavit of the city servant of Jehovah's Witnesses showing that he had been distributing literature since 1942. Then it is stated that petitioner was not baptized until September 23, 1951. His activity in the organization before baptism or ordination on September 23, 1951, was as a student preparing for the ministry, or as a regular minister.

VII.

It is stated (bottom of page 6, respondent's brief) that petitioner presented *The Watchtower* of February 1, 1951, to the local board at the time of his personal appearance. This is a misstatement. The February 1, 1951, issue of *The Watchtower* accompanied and was a part of the conscientious objector form filed with the local board in February, 1951. [R. 23, 26]

VIII.

The respondent (page 7, its brief) deals with the summary of the personal appearance as though it were a memorandum of reasons. Under Section 1624.2(b) of the regulations the summary is to be made of the evidence and does not relate to the reasons of the board for classification. The summary referred to (top of page 7) is printed in full at pages 13-14 of petitioner's main brief.

IX.

The statement concerning the testimony of the board clerk and the action taken by the board upon personal appearance is not entirely accurate (respondent's brief, pages 7-8). The Court should read the testimony of the clerk and consider the minutes of the board as well as the memorandum dictated by the chairman. The memorandum dictated by the chairman shows that the classification was not reopened and that the case was not considered *de novo*. [R. 22-34, 54-55]—See pages 13-14 of petitioner's main brief.

The official minutes of the local board show, also, that there was no reopening and consideration of the case. The official minutes read: "3-19-51 Board met with registrant. No action taken (see note in file)." [R. 21] The reference "(see note in file)" refers to the memorandum dictated by the chairman of the board, appearing at pages 13-14 of the petitioner's main brief. Both the minutes and the mem-

orandum show that the case was not reopened. This is in accordance with the testimony of the clerk that it was the policy of the board, when no new evidence was presented, not to reopen the case and not to consider the classification *de novo* as provided by the regulations. [R. 4, 5 7, 10]

The entire testimony of the clerk should be considered. [R. 4, 5, 6-7, 8, 10, 13] It is significant that the trial judge, in finding against petitioner, did not find that the case was reopened and that the matter was considered *de novo.* [R. 54-55]

It is also significant that no new classification was mentioned in the minutes or the memorandum dictated by the chairman of the local board. Failure of the local board to reclassify the petitioner upon the personal appearance proves that the case was not reopened and was not considered *de novo.*

X.

In footnote 6 (bottom of page 8, respondent's brief) criticism of Witmer by innuendo appears. It is stated that it was "not unnatural to prefer a deferment easier to obtain." It is not only natural, but also provided by the regulations that a registrant be classified in the lowest class. (See Section 1623.2 of the Selective Service Regulations.) The fact that Witmer attempted to get the best classification possible is not illegal.—*Taffs* v. *United States,* 8th Cir., 1953, 208 F. 2d 329; cert. denied 347 U. S. 928 (1954).

XI.

It is irrelevent and immaterial that petitioner spoke of his intention to become a full-time farmer and to have the full vocation of a minister, as emphasized on page 9 of respondent's brief. The law allowed him to make such claim. (Section 1623.2) He was obliged to show the local board any change in his draft status from time to time. See Section 1625.1(b); see *United States* v. *Vincelli,* 2d Cir., 1954, 215 F.

2d 210, rehearing denied with opinion, Nov. 9, 1954, 218 F. 2d 681.

XII.

On page 9 in the summary of argument the statement is made that the issue is not whether Witmer was denied his conscientious objector claim because of his willingness to work on the farm and contribute to the war effort. It is stated that "nothing of the kind appears in the record." This statement is challenged as being inaccurate. The issue is stated that it was whether one who was not a full-time farmer, and who was urging his wish to contribute to the war effort by becoming a full-time farmer, is sincere. What the Government says (at the bottom of page 9) is not clear, and when all is said and done it means the same thing that the Government contends at the beginning of the summary of argument (page 9).

XIII.

The summary of the argument of the Government overlooks completely the issue of the violation of petitioner's rights to procedural due process of law. The recommendation of the Department of Justice that Witmer be denied his conscientious objector status because of his willingness to farm and help the war effort "proceeded upon an inadmissible hypothesis," as held by the United States Court of Appeals for the Ninth Circuit in *Shepherd* v. *United States*, No. 14,105, Dec. 13, 1954, — F. 2d —. In that case the Ninth Circuit concluded: "We think that a hearing before a department proceeding upon an erroneous theory as to what constitutes objection to 'participation in war in any form,' is no better than no hearing at all."

Even though it be conceded for the sake of argument that there was basis in fact for the classification, nevertheless there has been a violation of procedural due process of law that the Government chooses to ignore.

XIV.

It is stated by the respondent (bottom of page 11 and top of page 12) that Witmer "is a sincere Jehovah's Witness." Yet (top of page 14) it is stated by the Government that both the local board and the Department of Justice were unwilling "to rely upon petitioner's sincerity." This concession and this statement are inconsistent. How can a man be conceded to be a sincere Jehovah's Witness and, at the same time, it be argued that there was basis in fact for a finding of insincerity? It is impossible to understand this type of hot-and-cold argument.

XV.

The Government argues (pages 12-13) that it was the nature of Witmer, which is the beliefs of Jehovah's Witnesses, that fails to show that he was conscientiously opposed to war. Reference is made to the respondent's brief in *Sicurella* v. *United States*, No. 250, this term. In response to this argument petitioner adopts the argument appearing in the reply brief for petitioner in the *Sicurella* case, No. 250, this term.

And it should be remembered that neither the Department of Justice nor the appeal board relied upon the petitioner's religious beliefs as the basis for denial of his conscientious objector status. It requires speculation on the part of the Court to say that this was relied upon by the appeal board. It is to be presumed that the appeal board relied upon the grounds stated in the recommendation of the Department of Justice. In relation to the appeal board the Department of Justice stands in the position of a judge to the jury in a general charge. It must be presumed that the grounds relied upon in a general verdict are all the grounds stated in the general charge. So it is here. All the grounds stated by the Department of Justice must be considered as having been relied upon.—*Stromberg* v. *California*, 283 U. S. 359 (1931); *Terminiello* v. *Chicago*, 337 U. S. 1 (1949).

XVI.

It is stated (bottom of page 13, respondent's brief) that "at all stages of the administrative process" it was found that petitioner lacked genuine objections to participation in war. Not only did the hearing officer dissent, but, also, there is evidence that the local board did not even pass upon the conscientious objector claim. This obviously was never considered by the board, at least upon Witmer's personal appearance. The case was not reopened. Petitioner was reclassified, and the memorandum of the local board shows that the conscientious objector claim was not even mentioned. It is difficult to conceive how it can be argued that this was considered by the local board. [R. 21, 33-34] The only claim that was considered was the ministry claim, and even then this claim was not used as the basis for reclassification. The local board merely considered the claim to determine whether to reopen or not. It did not consider the claim for the purpose of reclassification.

XVII.

The recommendation of the Department of Justice is relied upon as basis in fact because petitioner was willing to contribute to the war effort by farming. (See the brief, page 14.) It is said that willingness to contribute to the war effort is diametrically opposed to "abhorrence of war." To begin with, there is nothing said in the statute about abhorrence of war. The only thing prohibited by the statute is direct participation in war. A conscientious objector can be willing to forward the war effort indirectly and still not lose his status.

It is argued that a true objector does not "do something which he considers to be a contribution to the war effort." This is unreasonable and contrary to the act, which requires conscientious objectors to participate in the war effort indirectly by civilian work contributing to the national welfare.—See *United States* v. *Wilson*, 7th Cir., 1954, 215 F. 2d 443; *Franks* v. *United States*, 9th Cir., 1954, 216 F. 2d

266; *Clark* v. *United States*, No. 14,176, 9th Cir., Dec. 3, 1954, — F. 2d —; *Goetz* v. *United States*, 9th Cir., 1954, 216 F. 2d 270; compare *White* v. *United States*, 9th Cir., 1954, 215 F. 2d 782.

XVIII.

The statement made (footnote 9, page 14) is altogether unreasonable. To state that it is illegal for a conscientious objector to say that he is willing to contribute to the war effort and that the only persons that can speak of a contribution to the war effort are ones favoring war makes no sense. This type of argument reminds counsel of the charge given by the district court to the jury that a conscientious objector could not be believed because he was not worthy of credibility. (*Smith* v. *United States*, 4th Cir., 1946, 157 F. 2d 176) This type of argument means that a conscientious objector is barred from defending his position or even indicating that he is a good citizen. It means that the conscientious objector must remain silent and take a position of sabotage in order to get recognition under the law. This argument is absolutely ridiculous.

XIX.

Respondent argues (page 15) that there is a distinction between a conscientious objector who renders intentional assistance to the war effort and one who renders unintentional assistance to the war effort. It is stated that if a conscientious objector assists unintentionally, then he may be considered as conscientious. This means that it is impossible for a conscientious objector to be conscientious and not be *unconscious*. He must be out of his mind and must not understand the effect of his acts. It is impossible for this type of argument to be understood. It is beyond the realm of reality and outside the reach of reasonableness. Even he who performs civilian work contributing to the war effort indirectly as a conscientious objector when ordered to do so by his local board knows that he is contributing to the war effort,

and this contribution is intentional even though under the orders of the Government. The argument of the Government would prohibit a conscientious objector from acceptance of national civilian work. This argument is an absurdity.

XX.

As the second basis in fact relied upon by the Department of Justice and the respondent for the denial of the conscientious objector claim and the affirmance of the judgment of the court below, it is stated that petitioner was inconsistent because, after advancing his farmer's claim, he claimed to be a minister. (Page 15) Then again it is stated (page 15, footnote 11) that he failed to sign the conscientious objector form. It is stated that the failure to sign the form is not "among the items 'believed to be incompatible with a sincere conscientious objector claim.'" If this is the position of the respondent in this case, then why was it necessary to quote the conscientious objector form in full (footnote 1, page 4, respondent's brief)?

Concerning the argument about seeking the farmer's classification and the minister's classification, this point has been argued previously in this reply brief, where comment was made about respondent's statement of the facts about these two claims.—See pages 2, 6-7, *supra*; see also *Pine* v. *United States,* 4th Cir., 1954, 212 F. 2d 93; *Cox* v. *Wedemeyer,* 9th Cir., 1951, 192 F. 2d 920.

XXI.

At page 16 of the respondent's brief there appears extensive argument about the memorandum made by the local board. It should be remembered that what was considered by the local board and all that the local board talked about in its memorandum on personal appearance [R. 33-34] was the ministerial claim. It did not deal with the conscientious objector claim. It is immaterial, therefore, to talk about the board's finding a lack of sincerity based upon his ministerial claim.

If the local board denied him this classification because he made it in short sequence after making the farmer's claim, then the local board has defied the law and the regulations.—See the argument made, *supra,* pages 6-7.

That the registrant had the right to make several claims successively, see *Taffs* v. *United States*, 8th Cir., 1953, 208 F. 2d 329; cert. denied 347 U. S. 928 (1954); Section 1625.1 (b), Selective Service Regulations.

Since it was lawful to make these claims and unlawful for the local board to deny them because they were made in quick sequence in time, there was no basis in fact or law for the argument appearing on page 16 of respondent's brief.

The position respondent takes on the making of successive claims is unreasonable. The making of successive claims does not prove insincerity. There is a difference between evasion and avoidance of a duty. It is lawful to avoid. It is illegal to evade. The local board did not find that Witmer was evading a duty. Witmer had the right to try to get a lower classification than he had received. Indeed it was his duty to do so. Because he tried to get a lawful lower classification and failed does not legally establish that he was insincere. All Witmer did was take advantage of the rights accorded him under the law. Surely this ought not to spell insincerity or hypocrisy. His sincerity may have driven him to make such claims, and still it is legal to do so. Such argument made by the respondent penalizes an entirely innocent registrant for taking advantage of his rights. Nowhere in the act or in the regulations is it provided that if a person claims more than one classification at one time and fails on any claim he be regarded as insincere. Since there is no such provision in the act or regulations it is beyond the competency of the Department of Justice or the respondent in this case to rely upon petitioner's making the claims successively.

There have been many cases where it has been established that a registrant may change his claim even after clas-

sification.—*Dickinson* v. *United States*, 346 U. S. 389 (1953); *Hull* v. *Stalter*, 7th Cir., 1945, 151 F. 2d 633; *United States* v. *Vincelli*, 2d Cir., 1954, 215 F. 2d 210, rehearing denied with opinion, Nov. 9, 1954, 216 F. 2d 681; *United States* v. *Graham*, W. D. Ky., 1952, 109 F. Supp. 377.

The law allows such procedure. Since it is permitted by law, then how can the Government contend that it is basis in fact for denial of the conscientious objector status?

It is plain, therefore, that both grounds relied upon by the Department of Justice and the respondent as basis in fact for the denial of the conscientious objector status are without basis in law.

Why would the Government, under Section 1625.1(b), provide for the change of classification and at the same time provide penalties under the law for conscientious objectors who have invoked such procedure? Would not this be discrimination of the worst sort to penalize the conscientious objector for invoking these regulations, at the same time putting the procedure in the regulations to be made available? Certainly the President did not intend to use Section 1625.1(b) as a booby trap for conscientious objectors. To accept the Government's argument on this point as basis in fact would be nothing less than to do this.

It is utterly unreasonable to assume that the law intended that a conscientious objector be given the right to show a change in status, such as occupational or other status that would exempt him, and then penalize him if he failed to succeed in his effort to show a change in status.

XXII.

It is argued (page 17, respondent's brief) that the Court is not to weigh the evidence but is to consider petitioner's "inconsistencies and evasions." To begin with, there is no weighing of the evidence in this case. All the evidence is undisputed and there are no inconsistencies and evasions. Petitioner was straightforward and gave honest answers. Neither the Department of Justice nor the local board ques-

ed the credibility of the petitioner. The local board ed to make a memorandum of any lack of credibility on part of the petitioner.—*Williams* v. *United States*, 5th ., 1954, 216 F. 2d 350; *Pitts* v. *United States*, 9th Cir., 14,164, Dec. 7, 1954, — F. 2d —; *Ashauer* v. *United tes*, 9th Cir., No. 14,304, Dec. 21, 1954, — F. 2d —.

Since neither the local board nor the Department of tice questioned the truthfulness of the petitioner's state- its, then having "searched the record for some affirm- e evidence to support the Local Board's overt or implicit ing that defendant had not painted a complete or accu- picture of his activities, none has been found."— *ted States* v. *Fair*, W. D. Pa., 1954, 122 F. Supp. 666; also *Dickinson* v. *United States*, 346 U. S. 389, 396-397.

The statements made by the respondent about "incon- encies and evasions" and "conflicting utterances" con- ute mere name-calling and an attempt to picture peti- er falsely to this Court, contrary to law (page 17 of ondent's brief). It is, therefore, entirely erroneous for respondent to say that the issue here is "nothing more an attempt to dispute the weight" of the evidence. Also, statement made by respondent that this is a plea to this rt to find that the administrative officers "should not have elieved petitioner" (page 18, respondent's brief) is a representation. To begin with, no one disputed peti- er. Petitioner does not contend that there is a weighing he evidence. The evidence is undisputed. The question whether the local board acted beyond its jurisdiction use there was no basis in fact for the denial of the cientious objector status.—*Estep* v. *United States*, 327 . 114 (1946).

It is stated without basis (page 18, respondent's brief) "petitioner's own conduct, before the selective service rd" was a basis for a finding of insincerity. There was mproper or illegal conduct. As pointed out, all he did invoke the legal remedies available to him. Because he a conscientious objector and invoked these remedies

to avoid service it is charged that he was insincere. This is unreasonable and discriminatory.

XXIII.

In an attempt to distinguish the *Dickinson* case (346 U. S. 389 (1953)) it is stated: "[t]his Court found these facts uncontroverted" in the *Dickinson* case. The same situation exists here. The facts showing the conscientious opposition to military service are established by the uncontroverted evidence. It is therefore proper for this Court to state here "that the facts could not be disbelieved without further factual support for the disbelief." (See page 18 of respondent's brief.) Many courts have held that the doctrine of *Dickinson* v. *United States*, 346 U. S. 389 (1953), applies in cases where the conscientious objector status has been established by the undisputed evidence. This is established by the decisions cited on page 20 of petitioner's main brief. To this list should be added *Ashauer* v. *United States*, 9th Cir., No. 14,304, Dec. 21, 1954, — F. 2d —; and *Pitts* v. *United States*, 9th Cir., No. 14,164, Dec. 7, 1954, — F. 2d —.

XXIV.

It is argued (page 19) that "inner belief" is involved and subjective issues are presented that are within the jurisdiction of the draft boards alone. This argument has been disposed of in the main brief for the petitioner in *Simmons* v. *United States*, No. 251, this term, at pages 34-37.

If the Government's argument on this point is accepted in conscientious objector cases, then it will mean that there will be absolutely no review whatever for a conscientious objector in court. If he is classified I-A, then never, under any circumstances, would it be possible for the courts to upset an arbitrary and capricious classification because it was without basis in fact. The question of "inner belief" is present in every conscientious objector case. The argument of the Government is very specious and discriminates against conscientious objectors. Why should the court pro-

cedure be different in the case of the conscientious objector from that of the case of any other registrant on trial before the district courts of the United States or before the courts of appeals or even the Supreme Court of the United States? There is no reason for this distinction.

What the respondent is attempting to do here is to get this Court to make a holding that will result in the same situation as at the beginning, prior to "equal justice under law." What the Government is trying to do is push this Court back into the mire that existed in conscientious objector cases during World War II. During that period of time it was considered that there was no defense for prosecutions for refusal to submit to induction for conscientious objectors. (See the concurring opinion by Mr. Justice Frankfurter in *Estep* v. *United States,* 327 U. S. 114, 134 (1946).) Surely this Court is not to be lured, misled and ambushed by sophistry and led back into the recrudescence of the dark period of World War II, when over 4,000 of Jehovah's Witnesses were sent to prison because there was no judicial review in such cases. The subtle argument of the Government here, if accepted, would result in absolutely no judicial review in cases involving the conscientious objector status. Then all will have been in vain if the insidious suggestion of the respondent here is not rejected. *Estep* v. *United States,* 327 U S. 114 (1946); and *Gibson* v. *United States,* 329 U. S. 338 (1946), would mean nothing. Those decisions will have been overruled, and that is exactly what some prosecutors and the Department of Justice have stated: that they are waiting until this Court reverses present law and puts them back into the pleasant situation they were in during World War II, when no defenses were permitted in these prosecutions.

This Court ought to ponder the effect of accepting the designing argument of respondent. It would be most unreasonable and unfair to hold that conscientious objectors

have no right to contest an arbitrary and capricious classification in the courts.

XXV.

At the bottom of page 19 and the top of page 20 respondent speaks about certain undisputed facts. With these petitioner agrees. They are undisputed. What petitioner cannot understand is why it is that in one breath (page 18) the respondent says that there is a weighing of the evidence and then again on these pages it is said that the facts are undisputed. How can undisputed facts involve weighing of the evidence? Weighing of evidence is involved only when there is some contradiction or dispute in the facts.

XXVI.

On page 21 respondent suggests that there should not be "the slightest diminution in judicial redress in case of a classification without basis in fact." It is impossible to reconcile this statement with all the points of argument made by respondent which, if accepted, would prevent the Court from ever holding that the denial of a conscientious objector status is without basis in fact. It is said in the next sentence (page 21) that if the no-basis-in-fact rule is applied in conscientious objector cases it would be having the courts to "second-guess the administrative board" that "actually saw the registrant." It should be remembered that the appeal board never saw the registrant. The Court should also bear in mind that unless the local board makes a memorandum of disbelief there is no question of credibility.—See the argument at pages 13-14, *supra.*

XXVII.

Heretofore in discussing the undue restriction of the questions presented (*supra,* pages 2-3) it was pointed out that the respondent has deliberately refused to meet

the issue of whether procedural due process has been denied by the appeal board acting upon the recommendation of the Department of Justice. It has been pointed out that when the Department of Justice makes an illegal recommendation to the appeal board and this recommendation is relied upon, there is error, calling for a remand of the case from the courts to the Selective Service System. This is argued extensively at pages 22-25 of the main brief for petitioner in *Gonzales* v. *United States*, No. 69, this term.

It has been pointed out that there must be strict compliance with the law because there has been a very narrow scope of judicial review established in these cases. (See the main brief for petitioner in the case, pages 25-26.) The courts have frequently held that recommendations of the Department of Justice proceeding upon an illegal theory, when relied upon, are basis for the reversal of a conviction based on an order issued upon the final classification.—*Shepherd* v. *United States*, 9th Cir., No. 14, 105, Dec. 13, 1954, — F. 2d —; *Clementino* v. *United States*, 9th Cir., 1954, 216 F. 2d 10; *Batelaan* v. *United States*, No. 13,939, 9th Cir., Dec. 17, 1954, — F. 2d —; *Affeldt* v. *United States*, 9th Cir., No. 13,941, Dec. 14, 1954, — F. 2d —; *Clark* v. *United States*, 9th Cir., No. 14,176, Dec. 3, 1954, — F. 2d —; *Goetz* v. *United States*, 9th Cir., 1954, 216 F. 2d 270; *Taffs* v. *United States*, 8th Cir., 1953, 208 F. 2d 329; *Annett* v. *United States*, 10th Cir., 1953, 205 F. 2d 689; *United States* v. *Bortlik*, M. D. Pa., 1954, 122 F. Supp. 225.

It has been plainly shown in petitioner's main brief in point two (pages 21-25) that the recommendation of the Department of Justice was illegal. It is submitted, therefore, that it would be highly unjust if this Court were not to pass upon the second question presented to this Court.—See petitioner's main brief, pages 10, 21-25, 41-48.

It cannot be argued that there were good parts of the

recommendation of the Department of Justice. This is like a general charge to a jury, resulting in a verdict of guilty. (See the argument above, page 8) It requires speculation on the part of the Court to say that the illegal recommendation of the Department of Justice did not affect the result of the proceedings before the appeal board. Since there was a denial of procedural due process in the use of the recommendation by the Department of Justice the case ought to be remanded for this reason alone.

XXVIII.

Respondent isolates only one prong of petitioner's contention that there was a violation of procedural due process upon petitioner's personal appearance before the local board. It is stated (page 22 of respondent's brief) that the contention of petitioner is that "the local board assumed that it was foreclosed from changing petitioner's classification because petitioner had included with his request for a personal appearance a request for an appeal." (See page 22 of respondent's brief.) This is not all that happened. This is only one feature of the evidence. What actually happened was that the local board refused to reopen the case because it was the policy of the board not to reopen and reconsider any case on a personal appearance unless sufficient new and additional evidence was offered to change the mind of the board. The memorandum of the local board shows conclusively that the local board refused to reopen and actually refused to and did not reclassify petitioner. (See the discussion of the evidence on this point, *supra,* pages 5-6.) It is said that the local board "went ahead with the personal appearance and with a decision." (See respondent's brief, page 22.) This is true so far as it goes. The board did go ahead, but when it went ahead the proceeding was a sham. The local board did not go ahead with the case open. The case was closed when it started. The case was still closed when the board

stopped. It reached a decision, but the decision was not in accordance with Section 1624.2(b) of the regulations. The board did not reclassify. It merely reached a decision not to reopen, which was in plain defiance of Section 1624.2(c) of the regulations. The regulations mandatorily required that the local board proceed with the hearing with the case wide open. The board, nevertheless, proceeded with the case shut tight, cut and dried, in plain defiance of the regulations.

XXIX.

The respondent relies upon the finding by the trial court on page 54 of the record. (See page 23 of respondent's brief.) The testimony of the clerk of the local board can be used to fill in blank spaces in the record, but the testimony of the clerk of the local board can never be used to contradict or to impeach the written records of the local board. The very trial court that decided this case so held in *United States* v. *Hufford,* M. D. Pa., 1952, 103 F. Supp. 859. In that case the same trial court as in this case said that finding that members of the local board discussed the matter is not a finding that the local board reopened the case and reclassified the registrant. The finding by the trial court that registrant was told that his I-A classification "would remain the same, his appeal would be honored" (page 23, respondent's brief) is not equivalent to a reclassification required by Section 1624.2(c) of the regulations following a reopening of the case and a reconsideration of the case *de novo.* (*United States* v. *Strebel,* D. Kans., 1952, 103 F. Supp. 628) It should be remembered that the memorandum dictated by the chairman of the local board and the official minutes of the local board show conclusively that the case was not reopened and there was not a reclassification. Now, how can it be argued in the face of the facts and in the face of *United States* v. *Hufford, supra,* that the trial court found that there was a reopening and reclassification? To the contrary, there is no such find-

ing. The trial court did not find that the local board reopened and reclassified. The so-called finding of the trial court in this case is significant for only one thing, its omission of fact, rather than its findings of fact. The trial court omitted to discuss the vital matter established by the undisputed records of the board, that the case was not reopened and that the petitioner was not reclassified.

The clerk of the local board testified: "when our Board does not reclassify or classify immediately a registrant who is 1-A at a personal appearance they will tell them at that time they will remain 1-A." [R. 6] She also said that Witmer was told the matter was "out of the hands of the local board because he had taken an appeal." [R. 6] Yet the Government states (footnote 14, page 24) that "nothing of the kind appears—petitioner was simply told, after personal appearance had been granted him and decision rendered, that his next step would be with the appeal board." This statement is not an accurate representation of the record, to say the least.

XXX.

It is stated (pages 24-25) that the board, upon Witmer's personal appearance, considered the conscientious objector claim. There is absolutely nothing in the record of the personal appearance to show that the conscientious objector claim was considered. The only question presented on the personal appearance was whether the board would reopen because of petitioner's ministerial claim. The record of the board relates only to the ministerial claim and does not extend to the conscientious objector claim.

XXXI.

It is argued that the petitioner's position boils down to a complaint against the board for not making an accurate record as an "experienced corporation counsel draws a set of corporate minutes." (See pages 26-27, respondent's brief.) This contention of the respondent certainly does

not fairly present petitioner's contention. Petitioner does not contend that the record of the board is inadequate. (*United States* v. *Zieber,* 3rd Cir., 1947, 161 F. 2d 90; *United States* v. *Garvin,* W. D. Pa., 1947, 71 F. Supp. 545) Petitioner's contention is that, using the records as they are drawn up, they cannot be impeached by oral testimony according to the trial court in this case. (*United States* v. *Hufford, supra*) The undisputed evidence shows that the local board defiantly refused to follow the procedure prescribed by Section 1624.2(c) of the Selective Service Regulations.

XXXII.

It is stated in footnote 15 (page 27) that petitioner has receded from his contention that the local board refused to reopen and reclassify. This assertion by the Government is absolutely wrong. Petitioner stands by every word that he said in the petition for certiorari and every word in the main brief on this subject.

The statement respondent makes in footnote 15 (page 27): "there was no refusal to reopen," is absolutely contrary to the record, as is shown by the memorandum dictated by the chairman of the local board and the minutes of the local board. Look at page 21 of the record. It says: "No action taken (see note in file)." [R. 21]

It is uniform procedure that when a draft board reopens a case upon registrant's personal appearance it makes the same entry as that which appears two lines above the entry for "3-19-51." [R. 21] Had the board reopened the case and reclassified, would it not have followed the procedure required by Section 1624.2(c) of the regulations and made an entry like that of "2-21-51," which reads: "Classified 1-A. Form 110 sent 2-22-51"?

It is clear that if the local board knew enough to make this sort of entry on "2-21-51" [R. 21] it had sense enough to do so on "3-19-51." It is not reasonable to say that it would take a corporation lawyer to know that the board

should write the same entry, if it were following the regulations, on "3-19-51" in the minutes. [R. 21] It is well known and lawyers of the Selective Service System and those of the Department of Justice must concede that it is the uniform practice required by Section 1624.2(c) of the regulations that, had the board followed that regulation, it would have in fact, without the aid of a corporation lawyer, written into the minutes "3-19-51 Reclassified I-A. Form 110 sent." Why is it now in the face of this uniform, well-established practice the Government has the audacity to contend before this Court that the local board complied with the regulations?

If this defiance of the regulations is a compliance with the regulations, then any violation of the procedural regulations can always be held to be a compliance. The position of the respondent makes a farce and a nullity out of law and procedural due process.

XXXIII.

It may be contended that the *de novo* classification by the appeal board cured the denial of a full and fair hearing upon petitioner's personal appearance before the local board. Petitioner had only one hearing before the local board. He had no personal appearance before the appeal board. It has been held that the reclassification upon appeal does not make harmless the denial of due process of law. —*Knox* v. *United States*, 9th Cir., 1952, 200 F. 2d 398; *United States* v. *Zieber*, 3rd Cir., 1947, 161 F. 2d 90; *United States* v. *Stiles*, 3rd Cir., 1948, 169 F. 2d 455; *United States* v. *Fry*, 2d Cir., 1953, 203 F. 2d 638; *United States* v. *Peterson*, N. D. Cal. S. D., 1944, 53 F. Supp. 760; *United States* v. *Laier*, N. D. Cal. S. D., 1943, 52 F. Supp. 392.

In *Franks* v. *United States*, 9th Cir., 1954, 216 F. 2d 266, 270, the court said:

> "Therefore a registrant who fails to have a fair chance for his proper classification on his appear-

> ance before the local board has been denied something which cannot be cured through the action of the appeal board. Such was our holding in *Knox* v. *United States*, 9th Cir., 200 F. 2d 398."

That he had a personal appearance and opportunity to discuss his claim before the hearing officer of the Department of Justice also is no cure of the prejudicial error in denying due process on his personal appearance before the local board.—*United States* v. *Fry*, 2d Cir., 1953, 203 F. 2d 638.

CONCLUSION

WHEREFORE, for the reasons above stated and for those appearing in the main brief for petitioner, it is submitted that the judgment of the court below should be reversed.

Respectfully,

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January, 1955.

Brief for the U. S. in Opposition

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In the Supreme Court of the United States

OCTOBER TERM, 1954

PHILIP ANDREW WITMER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 52-59) [1] is reported at 115 F. Supp. 19. The opinion of the Court of Appeals (R. 61-62) is reported at 213 F. 2d 95.

JURISDICTION

The judgment of the Court of Appeals was entered on May 13, 1954 (R. 62). On June 1, 1954, the time for filing a petition for a writ of certiorari was extended to June 30, 1954, by order of Mr.

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[1] The designation "R." refers to petitioner's Appendix below, and the designation "Tr." to the original transcript of testimony, both on file with the Clerk of this Court.

Justice Burton (R. 63), and the petition was filed on June 24, 1954. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether the denial by the Selective Service system of petitioner's claim of classification as a conscientious objector was without basis in fact.

2. Whether the Selective Service local board refused or failed to give full consideration to the case presented by petitioner at his personal appearance before the board.

STATUTE AND REGULATION INVOLVED

The pertinent portions of the Universal Military Training and Service Act, and Regulations issued thereunder, are set forth in the Appendix, *infra*, pp. 15-18.

STATEMENT

Petitioner seeks review of the judgment of the Court of Appeals for the Third Circuit (R. 62) affirming the judgment of the District Court for the Middle District of Pennsylvania finding petitioner guilty of violating the Universal Military Training and Service Act, by refusing on December 5, 1951, to be inducted into the armed forces, and imposing a sentence of three years' imprisonment (R. 60).

Petitioner's record with the Selective Service system may be summarized as follows:

Petitioner was born on February 7, 1930 (R. 16) and filed his classification questionnaire, together with an explanatory letter, on January 31, 1951

(R. 16, 22). In the letter, petitioner stated that he was employed in a hat factory [2] and that he also operated a portion of his father's farm and intended to increase his farm work (R. 22-23). The letter closed with the following (R. 23):

> * * * It is my ambition to become a farmer and devote all my time to farming. For this reason I am appealing to you to grant me an agricultural classification as I assure you that I will increase production year after year, and contribute a satisfactory amount for the war effort and civilian use.

With respect to the information on "Minister, or Student Preparing for the Ministry", the questionnaire was marked, "Does not apply" (R. 18). However, petitioner signed the portion of the form in which conscientious objection to war is indicated (R. 20). In the special form for conscientious objectors, filed by him on February 5, 1951, he signed neither of the printed statements in Series I specifying objection to combatant service or to noncombatant service. [3] Petitioner appended a written statement "for section 1(B)" as follows (R. 27):

---

[2] This work averaged 40 hours per week (R. 18).

[3] This portion of the form was not printed in petitioner's Appendix below. The language, with the blanks left by petitioner at the places for signature, appears in the Government exhibit as follows:

"Series I.—CLAIM FOR EXEMPTION

"INSTRUCTIONS.—The registrant must sign his name to either statement A or statement B in this series but not to both of them. The registrant should strike out the statement in this series which he does not sign.

"(A) I am, by reason of my religious training and belief,

> My training and belief in relation to a Supreme Being involves duties superior to those arising from any human relation. This prevents me from turning aside from those superior duties which I owe to a superior Being.

Petitioner stated, *inter alia,* in other portions of the form, that both of his parents were Jehovah's Witnesses (R. 25), that he was instructed by them in the study of the Bible and in 1942 he himself "began to study the Bible with aid of the Watchtower" (R. 24), that he engaged in "Witnessing from door to door" from 1948 to date (R. 25), that he had "tried to tell others * * * of how [God] will put a stop to all wars" (R. 24), and that he "believe[d] in the use of force only at the command of Almighty God" (R. 24). He stated (R. 24):

> I am absolutely neutral toward the political disputes and the international controversies

---

conscientiously opposed to participation in war in any form. I, therefore, claim exemption from combatant training and service. I understand that if my claim is sustained I will be inducted into the armed forces but will be assigned to noncombatant service as defined by the President.

[Left blank.]
(Signature of Registrant)

"(B) I am, by reason of my religious training and belief, conscientiously opposed to participation in war in any form and I am further conscientiously opposed to participation in noncombatant training or service in the armed forces. I, therefore, claim exemption from combatant training and service and, if my claim is sustained, I understand that I will, because of my conscientious objection to noncombatant service in the armed forces, be deferred as provided in Section 6 (j) of the Selective Service Act of 1948.

[Left blank.]
(Signature of Registrant)

> and combats of this world. I take no active or violent part for either side, but pay my vows to God and always advocate his kingdom and way of salvation.

In response to the question whether he had "ever given public expression" to the views stated as the basis for his claim of conscientious objection, he wrote "No" (R. 24).

On February 21, 1951, petitioner was classified I-A (R. 21). He wrote to the local board that he was "a minister of the gospel" and wished to make a personal appearance to present evidence of "this fact" and to appeal from his classification.[4]

At his personal hearing before the board on March 19, 1951, petitioner presented an affidavit from the City Servant of his Company of Jehovah's Witnesses stating, *inter alia,* that petitioner had "on many occasions engaged in the preaching of the good news or gospel to others" (R. 28). He also presented a long typewritten statement of his own, asserting, *inter alia,* that he had begun "to carry Bibles and Bible study aids from door to door" in 1942 (R. 29); that to be ordained did not require attendance at a seminary or school (R. 30) or performing funeral or marriage ceremonies (R. 31) [5];

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[4] The text of the letter is as follows (R. 27-28):

"On the strength of my right to appeal my service classification I wish to state that I am a minister of the gospel.

"On the strength of this fact I wish to appeal this classification and request a personal appearance to present evidence to this fact."

[5] But petitioner was not baptized until September 23, 1951 (R. 42).

that he engaged in secular work to permit him to engage in his ministry (R. 30); that his "weapons are not carnal" (R. 32); and (R. 32):

> The work that I now do is of greatest universal importance therefore I could not take part in a conflict of national or even international importance. If I would take part in such conflict I would not be keeping unspotted from the world, and I would therefore be breaking my covenant * * *.

The summary of the hearing, on record in the board's file, indicates that the chairman had commented concerning petitioner's termination of his employment of three years' standing at the hat factory two weeks after being classified I-A (R. 33); that petitioner stated that he intended to start getting his father's farm into shape, although that farm had not been worked as a farm for 23 years (R. 33-34); that the only evidence of petitioner's ministry was some paraphernalia from the Watchtower Society, and that petitioner asserted that Jehovah's Witnesses were ordained when they commenced distributing literature (R. 34). The summary concluded (R. 34):

> * * * The Board felt this was not sufficient evidence to warrant a 4-D Classification and informed the registrant his case would be sent up to the Appeal Board following his physical examination.

At the trial, in March 1952, the board clerk testified that after petitioner had been heard there was

discussion among the members of the board (Tr. 25) and that, at the end of the hearing the board chairman apprised petitioner that his I-A classification would remain the same and, upon physical examination, his file would be forwarded to the appeal board (R. 5-7).

Upon cross-examination by petitioner's counsel [6], the clerk testified to some language, suggested by petitioner's counsel as having been uttered to petitioner, as follows:

> Q. Isn't it a fact that at that time [when he was told he would remain I-A] Mr. Witmer was told the matter was out of the hands of the local board because he had taken an appeal?
>
> A. That is correct.
>
> Q. In other words, the local board could not do anything at that time because he had taken an appeal, isn't that what you told him or what the board chairman told him?
>
> A. Yes sir, that is correct. [R. 6.]

But the clerk recalled no such language at a time before petitioner entered the hearing room and the hearing and decision were completed (R. 10, Tr. 63). [7]

The appeal board forwarded the file to the De-

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[6] Apparently based upon the clerk's brief note on the back of the questionnaire "3-19-51 Board met with registrant. No action taken (see note in file)" (R. 5, 21).

[7] "Q. Isn't it also a fact that at that time they agreed that because of his appeal, the matter was out of their hands and they couldn't change his classification?

"A. That I don't remember."

partment of Justice on April 24, 1951 (R. 34-35). The hearing officer recommended classification of petitioner as a conscientious objector, relying upon petitioner's active participation as a Jehovah's Witness and concluding, with respect to petitioner's attempt to be deferred on other grounds, that "[i]t is not unnatural to prefer a deferment easier to obtain" (R. 36-39).

However, the Department of Justice did not concur in the hearing officer's recommendation. The Department, on October 18, 1951, pointed out that it was incompatible with sincere conscientious objection for a registrant to urge, as petitioner had urged, that he be permitted to increase his farming activity in order to contribute to the war effort (R. 35-36).

The appeal board, on November 2, 1951, unanimously classified petitioner I-A (R. 39). On December 5, 1951, he refused to be inducted (R. 48-50).

ARGUMENT

1. Petitioner contends that the denial of his claim to classification as a conscientious objector was arbitrary and capricious. The contention is advanced in general form by attempting to establish this case as similar in its facts to other decided cases (Question II, Pet. 3, 29-31) and, more specifically, by an attempt to present the decision below as having been based upon the single fact that petitioner engaged in farming which might indirectly assist the defense effort (Question I, Pet. 2-3, 22-29). But the essence of this case is not the fact

of petitioner's farming, nor was the case decided upon any such basis.[8] What was of significance here was that petitioner himself urged upon the local board his willingness and desire to "contribute" to the "war effort" by farming. Petitioner affirmatively sought an exemption upon the basis of contribution to the defense effort—an exemption diametrically inconsistent with one based upon abhorrence of war. Petitioner wrote to the board, "I am appealing to you to grant me an agricultural classification as I assure you that I will increase production year after year, and contribute a satisfactory amount for the war effort and civilian use." His letter urging the value of his farming to the defense effort is without parallel in the cases cited by him as being in conflict, and from this letter the Selective Service authorities clearly were entitled to conclude that petitioner was not sincere in claiming that he was conscientiously opposed to participation in war. The board's doubts of petitioner's general sincerity could find further support in his belated claim of a ministerial exemption upon a particularly skimpy record. There being a basis in fact for the denial of petitioner's claim, his classification is not to be

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[8] Petitioner's contention (Pet. 22) that the "courts below held that [registrants] could lose their conscientious objector status if they worked or were willing to work in a defense plant" is not only devoid of foundation, but is completely inapposite. The argument misconceives as a narrow, absolute rule what is actually a ruling that the entirety of a registrant's conduct may be weighed in judging his sincerity in claiming to be a conscientious objector.

set aside merely because another tribunal might have reached a different appraisal of the weight of the particular evidence before the board. *Estep* v. *United States*, 327 U. S. 114, 122-123; *Dickinson* v. *United States*, 346 U. S. 389, 394.

2. Petitioner contends that at the time of his personal appearance before the board there was a "refusal to reopen and reclassify" him (Pet. 4, 31-36). The contention is based upon a patent misconception of the facts.

The board in its written summary (R. 33-34), of record in the file, enumerated three new matters of fact presented at the personal appearance, i.e., that petitioner had left his work at the factory two weeks after being classified I-A; that petitioner, after his father's farm had not been worked for 23 years, now desired to get the farm "in shape"; and that petitioner now claimed to be a minister, adducing an ordination by the distribution of literature.[10] The board, of course, did not summarize mere reiterations of matter already presented, since the written summary, under the regulations, is only for "further information" presented at the personal appearance (Regulations, *infra*, p. 18). Similarly, the board having theretofore specifically passed upon two of the classifications urged upon it, i.e., agricultural worker and conscientious objector, and upon reconsideration

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[10] Petitioner was not baptized until half a year after this hearing (*supra*, p. 5).

finding nothing to warrant a different conclusion, restricted its specific written reference to the ministerial classification now claimed for the first time. Concerning this new claim, the board recorded its finding: "not sufficient evidence to warrant a 4-D Classification" (*supra*, p. 6).

Petitioner now seeks to adduce from this specific reference to the new claim, a complete *non sequitur* that the board considered nothing else (Pet. 33), and thereby seeks to develop a purported conflict with the earlier case of *United States* v. *Stiles*, 169 F. 2d 455, in the same circuit, in which a board had requested an affidavit from a registrant, informed him it "would be acted upon", and then never apprised him of the taking of any action.[11] However, in the instant case, the record discloses that petitioner presented a lengthy statement at the hearing in which he reiterated, *inter alia*, the basis of his conscientious objector claim (*supra*, pp. 5-6), and that, after petitioner had completed his presentation, the board members discussed the decision among themselves (*supra*, pp. 6-7). It is contrary to normal experience to assume that the board members mechanically screened out of their thoughts the agricultural and conscientious objec-

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[11] Petitioner strains his conclusion of fact that the board took no action, to the extent of asserting, *e. g.* "Nowhere in the record does it appear that the local board considered the farmer's classification" (Pet. 33), despite the fact that the summary itself reproduces petitioner's statement of his plan concerning farming.

tion classifications which were clearly within petitioner's presentation at the hearing.

Petitioner's entire present argument is simply a criticism of the failure of a board of laymen meticulously to put into writing every detail of deliberation and ultimate decision. The contention is aptly disposed of by the Court of Appeals below (R. 61), relying upon its *en banc* decision in the companion case of *United States* v. *Hagaman,* 213 F. 2d 86, in which the following appears (at p. 91):

> It is one thing, however, to protect a man when he is prejudiced by the failure of administrative authorities to observe the precautions taken to guard his rights. It is another thing to create an administrative procedure, designed to be handled by volunteer laymen in communities throughout the nation, as technical and ritualistic as common law pleadings. We have said in an earlier opinion that a registrant is not obliged to make his points with his draft board in the fashion required of a well-trained lawyer, *United States ex rel. Berman* v. *Craig,* 207 F. 2d 888 (C.A. 3, 1953). It is likewise true that the board's proceedings do not need to be recorded with the meticulous accuracy with which an experienced corporation counsel draws a set of corporate minutes.

There can be no real doubt from this record that all three of petitioner's claims for deferment or

exemption from military service were considered by the board, and that the board clearly decided and informed petitioner that his case merited none of such classifications.[12]

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[12] Petitioner's contrary contention (Pet. 4) that the local board thought that it was foreclosed, by petitioner's letter of appeal from reconsidering petitioner's classification, is based solely upon the alleged statement of the local board chairman, dubiously recalled by the board's clerk at the trial a year after the petitioner's personal appearance (see Statement, *supra*). Petitioner in another respect confuses the issue by asserting (Pet. 4, 32-33) that the Court of Appeals "held that because the local board told [petitioner] it was not going to reopen and reclassify, * * * such [notice] cured the deprivation of a right to a full and fair hearing." The Court of Appeals made no such holding. In the Court of Appeals, petitioner had made a further contention, now virtually abandoned (Petitioner's Br. below, pp. 1, 19-22), that because he was not served an additional written notice of his retention in classification I-A, he had been deprived of a right. The Court of Appeals approved the District Court's opinion, which pointed out, as held in *Martin* v. *United States*, 190 F. 2d 775, 779 (C.A. 4), certiorari denied, 342 U.S. 872, that the clear, personal notice to petitioner at the hearing, together with the perfecting of the appeal, precluded any prejudice to petitioner from the absence of a further written notice (R. 56, 59, 61-62). But the Court of Appeals at no time subscribed to the purported fact, now suggested by petitioner, that the board had not reconsidered petitioner's classification; the court approved, instead, a finding that there had been a true reconsideration, and a basis in fact for again holding petitioner to be in classification I-A (R. 56, 58-59; and see, specifically, the cases distinguished by the district court at R. 59, fn. 5).

CONCLUSION

The questions presented on the particular facts of this case were correctly decided below. No conflict of decisions is involved. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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JULY, 1954.

APPENDIX

Universal Military Training and Service Act, 62 Stat. 604, 612, 622; 65 Stat. 75, 86:

Section 6 (j) [50 U. S. C. App. 456 (j)]:

Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code. Any person claiming exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the armed forces under this title, be assigned to noncombatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4(b) such civilian work contributing to the maintenance of the national health, safety, or interest

as the local board may deem appropriate * * *. Any person claiming exemption from combatant training and service because of such conscientious objections shall, if such claim is not sustained by the local board, be entitled to an appeal to the appropriate appeal board. Upon the filing of such appeal, the appeal board shall refer any such claim to the Department of Justice for inquiry and hearing. The Department of Justice, after appropriate inquiry, shall hold a hearing with respect to the character and good faith of the objections of the person concerned, and such person shall be notified of the time and place of such hearing. The Department of Justice shall, after such hearing, if the objections are found to be sustained, recommend to the appeal board that (1) if the objector is inducted into the armed forces under this title, he shall be assigned to noncombatant service as defined by the President, or (2) if the objector is found to be conscientiously opposed to participation in such noncombatant service, he shall in lieu of such induction be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4(b) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate * * *. If after such hearing the Department of Justice finds that his objections are not sustained, it

shall recommend to the appeal board that such objections be not sustained. The appeal board shall, in making its decision, give consideration to, but shall not be bound to follow, the recommendation of the Department of Justice together with the record on appeal from the local board. * * *

Section 12 (a) [50 U. S. C. App. 462 (a)]:

Any * * * person * * * who * * * refuses * * * service in the armed forces * * * or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this title, or rules, regulations, or directions made pursuant to this title * * * shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment * * *.

Selective Service Regulations, Title 32, C. F. R. (1949 ed.), Section 1624.2:

Appearance before local board. * * *

(b) At any such appearance, the registrant may discuss his classification, may point out the class or classes in which he thinks he should have been placed, and may direct attention to any information in his file which he believes the local board has overlooked or to which he

believes it has not given sufficient weight. The registrant may present such further information as he believes will assist the local board in determining his proper classification. Such information shall be in writing, or, if oral, shall be summarized in writing and, in either event, shall be placed in the registrant's file. The information furnished should be as concise as possible under the circumstances. * * *

(c) After the registrant has appeared before the member or members of the local board designated for the purpose, the local board shall consider the new information which it receives and shall again classify the registrant in the same manner as if he had never before been classified.

(d) After the registrant has appeared before the member or members of the local board designated for the purpose, the local board, as soon as practicable after it again classifies the registrant, shall mail notice thereof on Notice of Classification (SSS Form No. 110) to the registrant * * *.

(e) Each such classification shall be followed by the same right of appeal as in the case of an original classification.

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In the Supreme Court of the United States

OCTOBER TERM, 1954

PHILIP ANDREW WITMER, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

SIMON E. SOBELOFF,
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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the Court of Appeals (R. 61-62) is reported at 213 F. 2d 95. The opinion of the District Court (R. 52-59) is reported at 115 F. Supp. 19.

JURISDICTION

The judgment of the Court of Appeals was entered on May 13, 1954 (R. 62). On June 1, 1954, the time for filing a petition for a writ of certiorari was extended to June 30, 1954, by order of Mr. Justice Burton (R. 63). The peti-

tion was filed on June 24, 1954, and granted on October 14, 1954 (R. 79). The jurisdiction of this Court rests on 28 U. S. C. 1254(1).

QUESTIONS PRESENTED

1. Whether the denial by the Selective Service System of petitioner's claim for classification as a conscientious objector was without basis in fact.

2. Whether the selective service local board refused or failed to give full consideration to the case presented by petitioner at his personal appearance before the board.

STATUTES AND REGULATIONS INVOLVED

The pertinent portions of the Universal Military Training and Service Act, and Regulations issued thereunder, are set forth in the Appendix, *infra*, pp. 29-33.

STATEMENT

Petitioner was charged, in a one-count indictment returned on March 20, 1952, with refusal to be inducted, in violation of the Universal Military Training and Service Act (R. 3). Upon trial before a jury, petitioner was found guilty and sentenced to three years' imprisonment (R. 60). Petitioner did not contest the fact of his refusal to be inducted, or the denial of his claim for classification as a minister (R. 51-52). He contended that there was no basis in fact for denial of his claim for classification as a conscientious objector, and that the local selective service board, upon petitioner's personal appearance, did not consider new informa-

tion which he presented and did not accord him the required reclassification and notice thereof (R. 51-52). The Court of Appeals for the Third Circuit affirmed the conviction (R. 62).

Petitioner's record with the Selective Service System may be summarized as follows:

Petitioner was born on February 7, 1930 (R. 16). He filed his classification questionnaire, together with an explanatory letter, on January 31, 1951 (R. 16, 22), stating that he was employed in a hat factory 40 hours per week, and that he also operated a portion of his father's farm and intended to increase his farm work (R. 18, 22-23). In the letter petitioner expressed the ambition to devote all his time to farming, and closed with the following (R. 23):

> * * * For this reason I am appealing to you to grant me an agricultural classification as I assure you that I will increase production year after year, and contribute a satisfactory amount for the war effort and civilian use.

With respect to the information on "Minister, or Student Preparing for the Ministry", the questionnaire was marked, "Does not apply" (R. 18), but petitioner signed the portion of the form in which conscientious objection to war is stated (R. 20). In the special form for conscientious objectors, filed by him on February 5, 1951 (R. 23), he failed to sign the printed statements in Series I specifying objection to combatant service or to non-combatant

service.[1] Petitioner appended a written statement "for section 1(B)" as follows (R. 27):

> My training and belief in relation to a Supreme Being involves duties superior to those arising from any human relation. This prevents me from turning aside from those superior duties which I owe to a superior Being.

Petitioner stated, *inter alia,* in other portions of the form, that he was neutral in the controversies

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[1] The language of this portion of the form, with the blanks left by petitioner at the places for signature, appears in official *SSS Form No. 150* as follows:

"Series I.—CLAIM FOR EXEMPTION

"INSTRUCTIONS.—The registrant must sign his name to either statement A or statement B in this series but not to both of them. The registrant should strike out the statement in this series which he does not sign.

"(A) I am, by reason of my religious training and belief, conscientiously opposed to participation in war in any form. I, therefore, claim exemption from combatant training and service. I understand that if my claim is sustained I will be inducted into the armed forces but will be assigned to noncombatant service as defined by the President.

[Left blank.]
(Signature of Registrant)

"(B) I am, by reason of my religious training and belief, conscientiously opposed to participation in war in any form and I am further conscientiously opposed to participation in noncombatant training or service in the armed forces. I, therefore, claim exemption from combatant training and service and, if my claim is sustained, I understand that I will, because of my conscientious objection to noncombatant service in the armed forces, be deferred as provided in Section 6(j) of the Selective Service Act of 1948.

[Left blank.]
(Signature of Registrant)

and combats "of this world" and "I take no active or violent part for either side, but pay my vows to God and always advocate his kingdom and way of salvation" (R. 24). He believed in the use of force, however, "at the command of Almighty God" (R. 24). He reported that he had acquired his beliefs through instruction by his parents in the study of the Bible (both parents were Jehovah's Witnesses [R. 25]) and in 1942 himself "began to study the Bible with aid of the Watchtower" (R. 24).

In response to the question asking a description of the actions which "conspicuously demonstrate[d]" petitioner's depth of conviction, he replied that he had "tried to tell others about God's Kingdom, and of how he will put a stop to all wars" (R. 24). In response to the question whether he had "ever given public expression" to the views stated as the basis for his claim of conscientious objection, he wrote "No" (R. 24).

On February 21, 1951, petitioner was classified I-A (R. 21). He then wrote to the local board that he was "a minister of the gospel"—an exemption not theretofore claimed—and wished to make a personal appearance to present evidence of "this fact" and to appeal from his classification.[2]

At his personal appearance before the board on

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[2] The text of the letter is as follows (R. 27-28):

"On the strength of my right to appeal my service classification I wish to state that I am a minister of the gospel.

"On the strength of this fact I wish to appeal this classification and request a personal appearance to present evidence to this fact."

March 19, 1951, petitioner presented an affidavit from the City Servant of his Company of Jehovah's Witnesses saying, *inter alia*, that petitioner had "on many occasions" engaged in the "preaching of the good news or gospel to others." The affidavit contained no reference to any assertions concerning conscientious objection by petitioner (R. 28). Petitioner also presented a long typewritten statement of his own, asserting, among other things, that he had begun "to carry Bibles and Bible study aids from door to door" in 1942 (R. 29); that to be ordained did not require attendance at a seminary or school (R. 30) or performing funeral or marriage ceremonies (R. 31);[3] that he engaged in secular work to permit him to engage in his ministry (R. 30); that his "weapons are not carnal" (R. 32); and (R. 32):

> The work that I now do is of greatest universal importance therefore I could not take part in a conflict of national or even international importance. If I would take part in such conflict I would not be keeping unspotted from the world, and I would therefore be breaking my covenant * * *.

Petitioner also presented the entire issue of The Watchtower for February 1, 1951, largely devoted to articles stating the official position that the Jehovah's Witnesses are not pacifists, but nevertheless are conscientious objectors (R. 9).

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[3] But petitioner was not baptized until September 23, 1951 (R. 42).

The summary of the hearing, on record in the board's file, notes that the chairman commented concerning petitioner's termination of an employment of three years' standing at the hat factory two weeks after being classified I-A (R. 33); that petitioner stated that he intended to start getting his father's farm into shape, although it had not been worked as a farm for 23 years (R. 33-34); that the only evidence of petitioner's ministry was some paraphernalia from the Watchtower Society, and that petitioner asserted, in response to questioning, that Jehovah's Witnesses were ordained when they commenced distributing literature (R. 34). The summary concludes (R. 34):

> * * * The Board felt this was not sufficient evidence to warrant a 4-D Classification [Ministry] and informed the registrant his case would be sent up to the Appeal Board following his physical examination.

At the trial, in March 1952, the board clerk testified that at the end of the hearing the board chairman apprised petitioner that his I-A classification would remain the same and, upon physical examination, his file would be forwarded to the appeal board (R. 5-7).

Upon cross-examination by petitioner's counsel,[4] the clerk testified to some language, suggested by

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[4] Apparently based upon the clerk's brief note on the back of the questionnaire, "3-19-51 Board met with registrant. No action taken (see note in file)" (R. 5, 21).

petitioner's counsel as having been uttered to petitioner, as follows:

> Q. Isn't it a fact that at that time [when he was told he would remain I-A] Mr. Witmer was told the matter was out of the hands of the local board because he had taken an appeal?
>
> A. That is correct.
>
> Q. In other words, the local board could not do anything at that time because he had taken an appeal, isn't that what you told him or what the board chairman told him?
>
> A. Yes sir, that is correct. [R. 6.]

But the clerk recalled no such language at a time before petitioner entered the hearing room and the hearing and decision were completed (R. 10).[5]

The appeal board forwarded the file to the Department of Justice on April 24, 1951 (R. 34-35). The hearing officer recommended classification of petitioner as a conscientious objector,[6] but the De-

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[5] "Q. Isn't it also a fact that at that time they agreed that because of his appeal, the matter was out of their hands and they couldn't change his classification?

"A. That I don't remember.

* * *

"Q. As soon as the hearing was over, the board chairman made the statement which I quoted twice * * *.

"A. That is correct."

[6] He relied upon petitioner's active participation as a Jehovah's Witness and concluded with respect to petitioner's attempt to be deferred on other grounds, that "[i]t is not unnatural to prefer a deferment easier to obtain" (R. 36-39).

partment of Justice did not concur in the hearing officer's recommendation. The Department, on October 18, 1951, pointed out that it was incompatible with sincere conscientious objection for a registrant to urge, as petitioner had urged, that he be permitted to increase his farming activity in order "to contribute to the war effort." The Department further noted the inconsistency between petitioner's expression of an intent to become a full-time farmer and to have the full vocation of minister. (R. 35-36.)

The appeal board, on November 2, 1951, unanimously classified petitioner I-A (R. 39). On December 5, 1951, he refused to be inducted (R. 48-50).

SUMMARY OF ARGUMENT

I.

The issue in this case is not that urged by petitioner as to whether one who merely expresses willingness to work on a farm and thus indirectly to contribute to the war effort is, by that fact alone, deprived of the classification of conscientious objector. No such position is taken by the government and nothing of the kind appears in the record. What is involved is the far different fact that petitioner, who was not a full-time farmer, affirmatively urged upon the selective service board his wish to contribute "to the war effort" by becoming a full-time farmer, although he asked the selective service board to believe, at the same time, that he was conscientiously opposed, not just to

combatant service, but also to noncombatant service. The government contends that this affirmative statement of petitioner was clearly an element to be weighed in testing whether he truly entertained the deepseated religious objection necessary to exemption as a conscientious objector. The government's position is that the assertion of petitioner, together with other facts impugning petitioner's sincerity—all pointed out by the selective service board and the Department of Justice—was a matter to be weighed by the selective service appeal board and that the consequent disbelief of petitioner clearly was not so capricious as to require its being set aside by a court.

II.

Petitioner's assumption that the local selective service board failed to reconsider and reclassify him at the time of his personal appearance is a complete misconception of the record.

The statement and printed material which petitioner presented at the time of his appearance included specific and extensive argument for his classification as a conscientious objector, as well as his new claim of being a minister. There was discussion by the members of the board after the presentation and the chairman thereupon told petioner his classification would remain the same, *i.e.*, I-A, and that his concurrent appeal would be honored. There is no foundation for petitioner's present effort to adduce from the discussion of the appeal an impression that the board supposed that

by reason of the appeal it could not act with respect to the personal appearance. The board did go ahead with the full appearance by petitioner and it made its decision. Moreover, the board's written summary of the appearance shows that the board denied the new IV-D classification because there was "not sufficient evidence" and there was not a word in the summary about any supposed inability of the board to act. There is, moreover, no dispute but that petitioner, at the end of his appearance and after discussion by the board members, was immediately and personally told the decision, that his appeal proceeded in due and proper course, and that, pursuant to the appeal, he duly appeared before the Department of Justice hearing officer and had his full, further opportunity to present his entire case.

ARGUMENT

I

Petitioner's Affirmative Proposal to Contribute "to the war effort" by Farming, Together With Other Indications of Insincerity, Afforded Ample Basis for Disbelief of His Assertion That He Was Conscientiously Opposed to War, Including Noncombatant Service.

The instant case presents a clear and relatively simple example of a proper basis in fact for disbelief of a claim of conscientious objection. It differs from *Gonzales* v. *United States* and *Simmons* v. *United States,* now before this Court (Nos. 69 and 251), in that the government does not here question, as it does in those cases, that petitioner

is a sincere Jehovah's Witness. In some respects it is similar to *Sicurella* v. *United States*, No. 250, in which there is discussed the question of whether certain sincerely-held beliefs of Jehovah's Witnesses are the type of religious opposition to war for which the statute grants exemption. In *Sicurella* it is the position of the government that opposition to a particular war, no matter how sincerely based on religious grounds, is not sufficient to warrant exemption where the registrant does not manifest opposition to all wars but reserves the right to fight in future wars approved by Jehovah, and where his objection to service is in reality an objection to any type of governmental inroad upon his part-time religious activity. Those factors are present in this case and are extensively argued by petitioner. It is the government's position that, taking petitioner's utterances at face value, they show only qualified opposition to current conflicts—reserving the right to participate in a war which he or his sect may deem, like early Bible wars, sanctioned by Jehovah.[7] Also, petitioner's own statements establish that the true essence of his claim is opposition, not to war, but to any interference with such time as he

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[7] Thus, petitioner believes in the use of force "at the command of Almighty God" and such a command, like the remainder of his religious belief, would be obtained from his study of the Bible and the advice of the Watchtower society (R. 24). He extensively denied that he is a pacifist (App. to Pet. Br.).

deems fit to devote to his religious activities.[8] If the question were reached, it would be the government's position that petitioner has not shown invalidity in his classification for these reasons, set forth at more length in the government's brief in *Sicurella*. But it is unnecessary to reach the *Sicurella* question in this case. Each Jehovah's Witness, according to the principles of the sect, is required to determine for himself the specific question of his position on war (see *Gonzales* v. *United States*, No. 69, this term, R. 57, *United States* v. *Taffs*, O.T. 1953, No. 576, R. 70-71), and the Department of Justice has always recognized that it is the individual's own beliefs which are controlling. It is the government's position that in this case the registrant has not shown even the type of specific present conscientious objection which appears in *Sicurella*, since he was not even opposed to supporting the conflict existing at the time of his classification.

The conclusion that the petitioner had not demonstrated a genuine objection to war was unanimous at all stages of the administrative process, with the single exception of one hearing officer. Both the local selective service board and the Department of Justice specifically adduced facts showing the basis

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[8] Thus, petitioner states that he cannot turn aside from "superior duties" (R. 27). He must preach the Gospel (R. 31). He says that "the work that I now do is of greatest universal importance therefore I could not take part in a conflict of national or even international importance" (R. 32).

for their unwillingness to rely upon petitioner's sincerity.

The report of the Department of Justice specified two elements occasioning distrust. First, petitioner, although claiming religious abhorrence of war even to the extent of noncombatant service (R. 38, Pet. Br. 11, 15-16, 28), nevertheless affirmatively urged upon the local board his willingness and desire to "contribute" to the "war effort" by farming. Petitioner thus actively sought an exemption upon the very basis of contribution to the war effort—an exemption diametrically inconsistent with one based upon abhorrence of war. The true objector to war does not voluntarily do something which he considers to be a contribution to the war effort, if he is willing to participate in noncombatant service it is only because he truly believes that that service is so indirect as *not* to be a contribution to war, but a contribution instead to the healing of war's effects, and the like. Petitioner, on the other hand, extolled his proposed contribution to the war effort, but still asked the board to believe his protestations that he was opposed, not only to combat, but even to noncombatant service.[9] Petitioner's repeated efforts in his brief (see, for example, Br. 47-48) to represent the position of the courts below and that of the

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[9] Petitioner's reference (Br. 24, 47) to Abraham Lincoln's extolling of the value of the agricultural work of objectors overlooks the fact that this extolling of the contribution was by one who favored and was prosecuting the war, and did not come from the mouth of someone supposedly opposed to war.

government as a rejection of the claim of conscientious objection by anyone working as a farmer is a complete misconception of the above distinction between an indirect, unintentional assistance of war effort, and a conscious, intended and expressed willingness to contribute to "the war effort" so long as the selective service board bows to the claimant's choice of the type of contribution.[10] The urging of an affirmative willingness to contribute to war impugns the candor of one claiming religious objection to war, and more emphatically is this true where the claim is religious objection, not to combat, but also to noncombatant service.

The Department of Justice also noted that petitioner, after earnest protestation of ambition to become a farmer and "devote all my time to farming" was pressing, within less than two months, a baseless claim to full exemption in the vocation of an ordained minister (*supra*, p. 9).[11] The suspiciousness of petitioner's claim that he was an ordained

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[10] Thus, petitioner phrases it in the brief (Br. 10) as if he were only "willing" to produce food that "might be held to be" indirect participation in the war effort. It was not at all something that "might be held" a contribution to the war effort. It was the petitioner himself who was asserting and urging that his proposed work *would be* and *was intended to be* a contribution "to the war effort."

[11] The letter of the Department of Justice (R. 36) also notes the failure of petitioner to sign Series I(A) or I(B) of the Special Form for Conscientious Objectors (*supra*, p. 4, n. 1). This fact is apparently not adduced as among the items "believed to be incompatible with a sincere conscientious objector claim." It accordingly does not call for the repetitious and extensive argument of petitioner that the failure to fill out the form is of no moment (Br. 17, 21, 38-39).

minister was noted by the local board as well. The board's summary pointed out that the claim was supported only by "some paraphernalia from the Watchtower Association" and an assertion by petitioner that a Jehovah's Witness was an ordained minister upon commencing the distribution of literature.[12]

To these grave implications of lack of candor are to be added the observations contained in the local board's summary of petitioner's appearance before it, noting that petitioner, two weeks after being classified 1-A, gave up a factory job which he had held for three years and stated that he intended to get his father's farm into shape—a farm that had not been worked as a farm for 23 years. The distrust engendered by such a patent effort to shore up an unfounded claim for agricultural exemption cannot be compartmentalized as somehow inapplicable to other utterances of petitioner, especially the very subjective utterances espousing a claim of conscientious objection.

Petitioner argues that the claiming of one exemption does not constitute a waiver of another (Br. 21, 39-40). But neither the Selective Service System nor the Department of Justice have concerned themselves with a waiver. What was actually involved was the evidentiary effect of petitioner's succession of *inconsistent* claims, damaging to any confidence in petitioner's candor or sin-

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[12] Petitioner was not baptized until half a year after the time of this statement to the local board (*supra*, p. 6).

cerity. He was not to be deprived of asserting all properly available grounds of exemption, but his record is in no sense to be equated (as petitioner seeks to do, Br. 39) with that of one who can be simultaneously a "farmer, judge and a father". Petitioner claimed deepseated religious objection to combat and noncombatant service, the while extolling his proposed agricultural service as a contribution to the war effort. This was never relied upon by the selective service board or the Department of Justice as a technicality of administrative pleading, but was considered significant on the basic and ultimate question of sincerity.

In the face of the foregoing record, even if it were permitted the courts to substitute their judgment on the weight of the evidence for that of the designated administrative agency—contrary to *Dickinson* v. *United States*, 346 U. S. 389, 394—it would be difficult to arrive at an independent conclusion *de novo* that petitioner's inconsistencies and evasions had not vitiated the trustworthiness of his claim of the necessary deep religious objection to war. When, in addition, due observance is accorded to the mandate of the statute making "final" the last appellate decision of the administrative process, it is even more difficult to take the further step and say that a selective service board is to be prohibited from finding in such a record of conflicting utterances a basis in fact for the obvious conclusion that petitioner did not have the requisite genuine religious objection to war.

The challenge here presented can accordingly be nothing more than an attempt to dispute the weight to be accorded to the grounds adduced—an attempt to state that the administrative officers should not have disbelieved petitioner—and in effect to transfer to the courts the administrative function specifically delegated by Congress to the selective service system. The entire end product of an extensive and careful administrative process cannot so readily be reduced to a complete nullity and the issue subjected to a virtual trial *de novo* in the courts.

Petitioner assumes (Br. 20-21, 36-38) that the recent decision of this Court in *Dickinson* v. *United States,* 346 U. S. 389, is here applicable to require some additional element of extraneous evidence beyond petitioner's own conduct, before the selective service board could find him insincere. No such interpretation is suggested by the decision. Dickinson's claim was that he was a minister. He produced facts as to the amount of time devoted to his religious activities, and as to the aspects of leadership involved in those activities, notably his status as a Company Servant in the sect's hierarchy. This Court found these facts uncontroverted, and it was in this connection—and only in this connection—that this Court stated that the facts could not be disbelieved without further factual support for the disbelief.

The instant case, that of a claim of the peculiarly subjective inner belief of a conscientious objection, presents a different demarcation between what is

fact and what is weighing of fact. The ultimate conclusion in the instant case relates to a matter of inner belief, and not one of outer activity such as —in the case of a minister—the amount of time devoted to preaching and the fact of leadership within the sect. As pointed out in the government's brief in *Simmons* v. *United States*, No. 251, this term, this difference is clearly recognized in the special provision made by Congress for an investigation and recommendation by the Department of Justice in the case of conscientious objection.

Of course, the actual existence of a true conscientious objection, like that of other subjective matters, is determined by the weighing of external manifestations and is in that degree dependent upon external facts. In the instant case, such facts consist of petitioner's observable conduct—his utterances and his acts under given sets of circumstances. There is no disbelief of the observable, objective facts and hence no question, as there was in *Dickinson*, *supra*, concerning unfounded disbelief of facts which a board could investigate and contravene by other facts. Petitioner's letter, urging his will and ability to contribute to "the war effort", is a fact, in writing. Similarly, his virtually simultaneous claim of farming as his life-work and of ordained ministry as his life-work is an undisputed fact. Nor is there any dispute as to the fact that, in point of time, petitioner, two weeks after classification as I-A, left a job of three-years' standing—a job which would not have the exemption pos-

sibilities of an agricultural employment. None of these facts are disputed. The disagreement arises only as to the weight of these facts as a basis for distrust of petitioner's claimed inner beliefs. But this weighing of facts to reach the ultimate conclusion is peculiarly the function delegated to the administrative process. The ultimate conclusion as to sincerity cannot be subjected by improper analogy with *Dickinson, supra,* to the impossible test of whether the board can bring forward some outright admission by petitioner that he had falsified or grossly overstated inner feelings, for such an admission would rarely if ever be unearthed by even the most extensive investigation process. This Court in *Dickinson, supra,* far from having foreclosed the decision here supported, has pointed out exactly the contrary in its caveat that the courts will *not* apply "a test of 'substantial' evidence" (346 U. S. at 396).

The issue here is not whether some other board might have considered petitioner's various positions as reconcilable with conscientious objection. The issue is not how this Court might interpret petitioner's acts and words *de novo.* The only issue is whether the board which had primary responsibility for making the decision could reasonably consider any fact of record as indicating that petitioner did not have the necessary deep religious abhorrence of war which the statute requires. For the reasons set forth, we think it is clear, not only that the board reasonably could, but that it reason-

ably should, have reached that conclusion. A person who designates and urges his proposed civilian work as actually being a real contribution to war forecloses his own contention that he is opposed to war, to say nothing of his additional claim that he is also opposed to noncombatant service.

This Court firmly reiterated the limitations on court review in such matters in *Dickinson* v. *United States*, 346 U. S. 389, 394, but the fact that the Court found an error in the classification process in that case has since been unduly magnified, while the Court's warning on the limitation of court review has been ignored. We respectfully suggest that there is need for an emphatic and authoritative statement of the intrinsic limitations of the *Dickinson* decision. This is not to say that there should be the slightest diminution in judicial redress in case of a classification without basis in fact, but it is to point out the equal danger of a too tempting, wide-open door leading the insincere or wavering registrant to assume that, by merely claiming total absence of basis in fact, he will be entitled to have a court second-guess the administrative board—the board which actually saw the registrant and questioned him on the complex conclusion as to the inner sincerity of his espousals of conscientious objection. It should be made clear that while, under *Dickinson*, objective facts may not be disbelieved by a board without the adducing of a basis for the disbelief, the decision in *Dickinson* in no sense imposes a requirement that, when a selective service board obtains and weighs various and conflicting objective bases

upon which it reaches its conclusion as to the subjective, inner belief of a registrant, the board is additionally required, before holding against the claimed exemption, to find some outright admission of the registrant that he was insincere.

II

Petitioner Was Accorded a Full Personal Appearance, Was Personally Notified of the Decision of the Board, and Was Afforded Full Subsequent Steps of Appeal and Additional Personal Appearance Before a Hearing Officer.

Petitioner attempts to find a procedural impropriety on the basis of assumptions made possible, if at all, only by the fact that the selective service board used lay language and failed to put into precise words every detail of its deliberation and ultimate decision. Basically, petitioner contends that the local board assumed that it was foreclosed from changing petitioner's classification because petitioner had included with his request for a personal appearance a request for an appeal. The short answer is that the board clearly entertained no such misapprehension, for it went ahead with the personal appearance and with a decision, which it assuredly would not have done if it had labored under the impression that it had lost jurisdiction.

Petitioner's contrary contention is extracted from a purported fragmentary remark of the board chairman, dubiously recalled a year later at the trial by the board clerk, with words put in her

mouth by petitioner's counsel.[13] Apparently the trial judge clearly sensed the fact that the chairman's remarks (whatever they were), made at the end of the hearing rather than before, had no such meaning as that sought to be developed by petitioner, for he specifically found (R. 54):

> The clerk of the local board testified that when defendant completed his presentation, *the members of the board discussed the matter* and the board chairman *then* told the registrant that his I-A classification would remain the same, his appeal would be honored; that if he was found acceptable after physical examination for the armed service his file would be forwarded to the appeal board. [Italics supplied.] [14]

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[13] "Q. Isn't it a fact that at that time Mr. Witmer was told the matter was out of the hands of the local board because he had taken an appeal?

"A. That is correct.

"Q. In other words, the local board could not do anything at that time because he had taken an appeal, isn't that what you told him or what the board chairman told him?

"A. Yes sir, that is correct." (R. 6.)

But compare:

"Q. Isn't it also a fact that at that time they agreed that because of his appeal, the matter was out of their hands and they couldn't change his classification?

"A. That I don't remember." (R. 10.)

[14] Petitioner's misapprehension of the matter is additionally apparent when the fragmentation of the testimony in the printed record is repaired by recourse to the full transcript, of which a copy is lodged with the Clerk of this Court. But there is in no event any justification for petitioner's carrying

Upon the tenuous assumption that the board felt itself unable to grant a hearing, petitioner places a broadening inverted pyramid of further argument that there was a "refusal to reopen and reclassify." Petitioner contends that because the board, in its summary, ruled specifically only on his additional claim of ministry, then advanced for the first time, that it considered nothing else (Br. 10 [III], 53). But the board in its written summary (R. 33-34) enumerated three new matters of fact presented at the personal appearance, *i. e.*, that petitioner had left his work at the factory two weeks after being classified I-A; that petitioner, after his father's farm had not been worked for 23 years, now proposed to get the farm "in shape"; and that petitioner now claimed to be a minister, relying upon an ordination by the distribution of literature. The board, of course, did not summarize repetitions of matter already presented, since the written summary, under the regulations, is only for "further information" presented at the personal appearance (Regulations, *infra,* p. 32). Similarly, the board having theretofore specifically passed upon two of the classifications urged upon it, *i. e.*, those of

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of his assumptions to the extreme of asserting the assumptions as fact, in his Statement of the Case (Br. 14). He asserts that the "undisputed evidence" establishes that petitioner "was told" that because he had concurrently asked an appeal "no action would be taken upon his case" and "the classification would not be changed." Nothing of the kind appears—petitioner was simply told, after personal appearance had been granted him and decision rendered, that his next step would be with the appeal board.

agricultural worker and conscientious objector, and upon reconsideration finding nothing to warrant a different conclusion, restricted its specific written reference to the ministerial classification then claimed for the first time. Concerning this new claim, the board recorded its finding "not sufficient evidence to warrant a 4-D [ministerial] Classification" (*supra*, p. 7).

Petitioner now seeks to draw from this specific reference to the new claim a complete *non sequitur*, namely that the board considered nothing else, and thereby seeks to develop a purported conflict with the earlier case of *United States* v. *Stiles*, 169 F. 2d 455, in the same circuit, in which a board had requested an affidavit from a registrant, informed him it "would be acted upon," and then never apprised him of the taking of any action. In the instant case, the record discloses that petitioner presented a lengthy statement at the hearing in which he reiterated, *inter alia*, the basis of his conscientious objector claim (*supra*, pp. 5-6), that he presented a lengthy printed argument asserting the claim of the Jehovah's Witnesses that they are conscientious objectors (*The Watchtower*, Feb. 1, 1951), and that, after petitioner had completed his presentation, the board members discussed the decision among themselves (*supra*, p. 23). It is thus completely without basis to assume that the board members mechanically screened out of their thoughts the agricultural and conscientious objection classifications which were clearly within petitioner's presentation at the hearing.

Petitioner's entire present argument appears, in short, to be an attempt to make capital of the failure of a board of laymen to put into writing every detail of deliberation and ultimate decision. It is wholly insubstantial for petitioner now to contend that when the board had heard him out, asked questions, discussed the case among themselves, and told him "that his I-A classification would remain the same" (R. 5), this was no decision or classification but merely a refusal to act. The contention is aptly disposed of by the Court of Appeals below (R. 61), relying upon its *en banc* decision in the companion case of *United States* v. *Hagaman,* in which the following appears (R. 72):

> It is one thing, however, to protect a man when he is prejudiced by the failure of administrative authorities to observe the precautions taken to guard his rights. It is another thing to create an administrative procedure, designed to be handled by volunteer laymen in communities throughout the nation, as technical and ritualistic as common law pleadings. We have said in an earlier opinion that a registrant is not obliged to make his points with his draft board in the fashion required of a well-trained lawyer, *United States ex rel. Berman* v. *Craig,* 207 F. 2d 888 (C.A. 3, 1953). It is likewise true that the board's proceedings do not need to be recorded with the meticulous accuracy with which an experienced corporation counsel draws a set of corporate minutes.

There can be no real doubt from this record that all three of petitioner's claims for deferment or exemption from military service were considered by the board, and that the board clearly decided and informed petitioner that his case merited none of such classifications.[15]

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[15] Petitioner has receded from the statement in his Petition (Pet. 4, 32-33) that the Court of Appeals "held that because the local board told [petitioner] it was not going to reopen and reclassify, * * * such [notice and his appeal] cured the deprivation of a right to a full and fair hearing." But petitioner now intimates as much by repeated indirect assumptions that the courts below or the government reasoned in such fashion (Br. 10 [III], 19, 26-27, 49-51). Needless to say, the Court of Appeals made no such holding and the government makes no such contention, for there was no refusal to reopen. In the Court of Appeals, petitioner had made a further contention, now virtually abandoned (Petitioner's Brief in the Court of Appeals, pp. 1, 19-22), that because he was not served an additional written notice of his retention in classification I-A, he had been deprived of a right. The Court of Appeals approved the District Court's opinion, which pointed out, as held in *Martin* v. *United States*, 190 F. 2d 775, 779 (C.A. 4), certiorari denied, 342 U.S. 872, that the clear, personal notice to petitioner at the hearing, together with the perfecting of the appeal, precluded any prejudice to petitioner from the absence of a further written notice (R. 58-59, 61-62). But the Court of Appeals at no time subscribed to the purported fact, now suggested by petitioner, that the selective service board had refused to reconsider petitioner's classification. The court approved, instead, a finding that there had been a true reconsideration, and a basis in fact for again holding petitioner to be in classification I-A (R. 56, 58-59, and see, specifically, the cases distinguished by the District Court at R. 59, fn. 5).

CONCLUSION

For the above reasons, it is respectfully submitted that the judgment of the court below should be affirmed.

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APPENDIX

Universal Military Training and Service Act, 62 Stat. 604, 612, 619, 622; 64 Stat. 1074; 65 Stat. 75, 86:

Section 6(j) [50 U.S.C. App. 456(j)]:

> Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code. Any person claiming exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the armed forces under this title, be assigned to noncombatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4(b) such civilian work contributing to the main-

tenance of the national health, safety, or interest as the local board may deem appropriate * * *. Any person claiming exemption from combatant training and service because of such conscientious objections shall, if such claim is not sustained by the local board, be entitled to an appeal to the appropriate appeal board. Upon the filing of such appeal, the appeal board shall refer any such claim to the Department of Justice for inquiry and hearing. The Department of Justice, after appropriate inquiry, shall hold a hearing with respect to the character and good faith of the objections of the person concerned, and such person shall be notified of the time and place of such hearing. The Department of Justice shall, after such hearing, if the objections are found to be sustained, recommend to the appeal board that (1) if the objector is inducted into the armed forces under this title, he shall be assigned to noncombatant service as defined by the President, or (2) if the objector is found to be conscientiously opposed to participation in such noncombatant service, he shall in lieu of such induction be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4(b) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate * * *. If after such hearing the Department of Justice finds that his objec-

tions are not sustained, it shall recommend to the appeal board that such objections be not sustained. The appeal board shall, in making its decision, give consideration to, but shall not be bound to follow, the recommendation of the Department of Justice together with the record on appeal from the local board. * * *

Section 10(b)(3) [50 U.S.C. App. 460(b)(3)]:

* * * [L]ocal boards * * * shall, under rules and regulations prescribed by the President, have the power within the respective jurisdictions of such local boards to hear and determine, subject to the right of appeal to the appeal boards herein authorized, all questions or claims with respect to inclusion for, or exemption or deferment from, training and service under this title, of all individuals within the jurisdiction of such local boards. The decisions of such local board shall be final, except where an appeal is authorized and is taken * * *. The decision of * * * appeal boards shall be final in cases before them on appeal unless modified or changed by the President. * * *

Section 12(a) [50 U.S.C. App. 462(a)]:

Any * * * person * * * who * * * refuses * * * service in the armed forces * * * or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this title, or rules,

regulations, or directions made pursuant to this title * * * shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment * * *.

Selective Service Regulations, Title 32 C.F.R. (1949 ed.), Section 1624.2:

Appearance before local board. * * *

(b) At any such appearance, the registrant may discuss his classification, may point out the class or classes in which he thinks he should have been placed, and may direct attention to any information in his file which he believes the local board has overlooked or to which he believes it has not given sufficient weight. The registrant may present such further information as he believes will assist the local board in determining his proper classification. Such information shall be in writing, or, if oral, shall be summarized in writing and, in either event, shall be placed in the registrant's file. The information furnished should be as concise as possible under the circumstances. * * *

(c) After the registrant has appeared before the member or members of the local board designated for the purpose, the local board shall consider the new information which it receives and shall again classify the regis-

trant in the same manner as if he had never before been classified.

(d) After the registrant has appeared before the member or members of the local board designated for the purpose, the local board, as soon as practicable after it again classifies the registrant, shall mail notice thereof on Notice of Classification (SSS Form No. 110) to the registrant * * *.

(e) Each such classification shall be followed by the same right of appeal as in the case of an original classification.

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